

NO. 83-493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AMERADA HESS CORPORATION and
L. A. STRICKLIN,

Petitioners,

v.

DAVID R. GREEN,

Respondent.

**PETITIONERS' REPLY TO BRIEF
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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Petitioners Amerada Hess
Corporation ("Amerada Hess") and L. A.
Stricklin ("Stricklin") (collectively
referred to herein as "Petitioners")
hereby submit the following reply to the
Brief in Opposition filed by Respondent
David R. Green ("Green"):

**I. RESPONDENT EFFECTIVELY
CONCEDES THAT THE COURT
BELOW ERRED IN DENYING
PETITIONERS THE RIGHT
TO FACTUALLY PROVE
FRAUDULENT JOINDER.**

The sole question presented to this Court by the Petitioners in their Petition for Writ of Certiorari ("Petition") is

[w]hether in an action removed to a federal district court from state court, an out-of-state defendant has the right in a hearing on the plaintiff's motion to remand to pierce the pleadings to prove that the substantive allegations in the complaint against the in-state defendant are so clearly false as to demonstrate that the defendant was fraudulently joined to defeat diversity jurisdiction.

The decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in this case wrongly denied Amerada Hess, the sole out-of-state defendant, the opportunity to present proof that Green's substantive allegations against Stricklin, the sole

in-state defendant, are false and constitute fraudulent joinder. Relying on B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), the court ruled that in a remand hearing, fraudulent joinder may be proved by (1) showing that the complaint states no cause of action in law, which constitutes the familiar Rule 12(b)(6) "failure to state a claim" examination of the elements of the stated legal causes of action, assuming all of the facts in the complaint to be true, or (2) piercing the pleadings to prove factually that the "jurisdictional facts" are false. Basing its decision on B., Inc., the Fifth Circuit limited its definition of jurisdictional facts to an inquiry as to whether the resident defendant in fact exists or is fictional and whether said defendant is actually a resident of the forum state. The court of appeals held that since "Green and Stricklin are

Mississippi residents, Green's pleadings of jurisdictional facts are obviously not fraudulent." Green v. Amerada Hess Corporation, 707 F.2d 201 (5th Cir. 1981). Thus, the court determined that it was error for the district court to consider the conclusive proof presented by Amerada Hess at the remand hearing that Stricklin was not in the position to have committed any of the substantive wrongful acts alleged against him in Green's complaint and thus was fraudulently joined.

Green incorrectly argues in his brief that the Fifth Circuit did not so limit Amerada Hess' right to pierce the pleadings to factually prove fraudulent joinder in this case, stating that the court "has not prevented defendants from submitting evidence on the fraudulent joinder issue and has not prevented the defendants from piercing the pleadings."

Brief in Opposition, at p. 16. In fact, Green concedes in his brief that "plaintiff could not rely on the mere allegations of the pleadings" to sustain his motion to remand. Id. at p. 11. Green recognizes in his brief that a nonresident defendant must be able to submit factual proof of the falsity of the substantive allegations of the complaint, "e.g., did the tort occur? was there a privilege? was there a contract? etc.", B., Inc. v. Miller Brewing Co., 663 F.2d 545, 551, n. 14 (5th Cir. 1981), in order for there to be any realistic opportunity to prove fraudulent joinder.

Green also agrees with Petitioners that "the proper procedure on removal where fraudulent joinder is alleged, is the same as that used in summary judgment." Brief in Opposition, at p. 16. In other words, "the removing

party, like the summary judgment movant, has the burden of establishing the absence of a genuine material issue of fact." Id. at 6, 7. Thus, Green concedes that if the Fifth Circuit did restrict Petitioners' right to present such proof, as is the case, then the court's decision is erroneous.

Since the Fifth Circuit dismissed as irrelevant the proof offered by the Petitioners concerning the total lack of validity of the substantive allegations against Stricklin, the court then proceeded to examine the "law prong" of the fraudulent joinder test--whether or not "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court." Green v. Amerada Hess Corporation, 707 F.2d 201, 205 (5th Cir. 1983). Contrary to the statement made by Green in his brief,

the Fifth Circuit did recognize a two-part, fact/law test of fraudulent joinder. This two-part test has been consistently utilized in prior decisions as discussed in the Petition.

If the Fifth Circuit had examined the evidence produced at the remand hearing regarding Stricklin's substantive liability to Green under a summary judgment standard, the Petitioners submit that the Court would have agreed, as discussed in the Petition, that the district court properly ruled that there is no "genuine issue of material fact" and that Stricklin was fraudulently joined. The fact that Green presented hearsay evidence and other irrelevant material to prop up his allegation that Stricklin was not fraudulently joined does not change the applicable standard of proof nor does it change the right of the district court to find that there is

no genuine issue of material fact as to Stricklin's liability to Green. As stated earlier, the Fifth Circuit wrongly refused to even consider whether or not the proof submitted by Amerada Hess satisfied the summary judgment burden of proof in the remand hearing. Thus, contrary to Green's arguments, the Petitioners are not asking this Court to "grant certiorari to review evidence and discuss specific facts". Brief in Opposition, at p. 9, n. 2. The issue, purely and simply, is a matter of law-- did the Fifth Circuit wrongly deny the Petitioners the right to present proof of the falsity of the substantive allegations against Stricklin in order to prove fraudulent joinder? Petitioners submit that the Fifth Circuit did commit this reversible error.

II. CONTRARY TO RESPONDENT'S ARGUMENTS, THIS APPEAL CONCERNS A CLEAR CONFLICT WITH OTHER DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL AND CONCERNS THE DEPRIVATION OF AN IMPORTANT FEDERAL RIGHT THAT IMPACTS THE ENTIRE FEDERAL COURT SYSTEM.

The Petitioners strongly disagree with Green's statement in his brief that the Fifth Circuit's decision in this case and in B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), are in accord with previous federal decisions on the issue of fraudulent joinder. Contrary to these Fifth Circuit opinions, decisions of this Court and of other courts of appeals and, indeed, of the Fifth Circuit itself, have consistently held that an out-of-state defendant has the right to prove fraudulent joinder by presenting at the remand hearing factual proof as to the falsity of the substantive allegations against the in-state

defendant, as discussed in the Petition. Thus, there exists a clear conflict between the Fifth Circuit's decision in this case and these prior applicable decisions which mandate a resolution by this Court.

The Fifth Circuit has taken an unprecedented step in this case and in B., Inc. v. Miller Brewing Co. in limiting actual proof of fraudulent joinder to "jurisdictional facts." Accordingly, Petitioners strongly disagree with Green's statement in his brief that "there is no important issue of federal law to be resolved by this Court." Brief in Opposition, at p. 15. The decision of the Fifth Circuit in this case effectively eliminates removal to federal court through factual proof of fraudulent joinder of the resident defendant. Thus, the decision has important consequences that directly

impact all courts in the federal system. As stated in the Petition, under the Fifth Circuit's decision, a plaintiff need only state in an adequate manner the elements of a single cause of action against any in-state resident in order to frustrate removal to federal court by an out-of-state defendant, regardless of how unconnected the resident defendant is with the controversy. The deprivation of this important federal right to removal and diversity jurisdiction by an out-of-state defendant is a significant departure from the accepted and usual course of judicial proceedings which mandates that this Court exercise its certiorari jurisdiction to consider the merits of Petitioners' appeal.

III. CONCLUSION

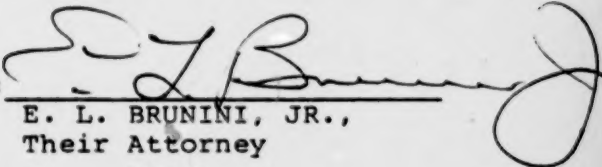
For these reasons, Petitioners respectfully submit that a writ of

certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

AMERADA HESS CORPORATION and
L. A. STRICKLIN, Petitioners

BY:



E. L. BRUNINI, JR.,
Their Attorney

CERTIFICATE OF SERVICE

I, E. L. Brunini, Jr., counsel of record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13 day of December, 1983, I served copies of the foregoing Petitioners' Reply to Brief in Opposition to Petition for a Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

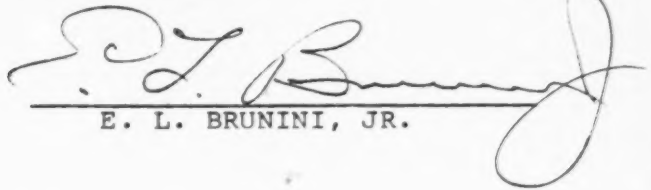
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I further certify that all parties
required to be served have been served.

This the 13 day of December,
1983.



E. L. BRUNINI, JR.